IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

WEDNESDAY, THE 14TH NOVEMBER 2007 / 23RD KARTHIKA 1929

RSA.No. 740 of 2004(D)

AS.58/1996 of ADDL.DISTRICT COURT-I,MAVELIKKARA
OS.276/1990 of MUNSIFF COURT,CHENGANNUR
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APPELLANT/APPELLANT/PLAINTIFF:

JOSEPH P.JOSEPH,
PATTARUMADATHILAYA PADIPPURACKAL,
MAZHUKOOR MEL MURI, CHENGANNUR VILLAGE.

BY ADV. SRI.P.R.VENKETESH
SRI.C.MURALIKRISHNAN (PAYYANUR)

RESPONDENTS: RESPONDENTS/DEFENDANTS:
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1. MATHEW ABRAHAM,
PADIPURACKAL PEREETHARAYIL, MAZHUKEER MEL MURI,
CHENGANNUR VILLAGE.

2. SOSAMMA MATHEW OF -DO- -DO-.

3. KERALA STATE,
REPRESENTED BY THE DISTRICT COLLECTOR, ALAPPUZHA.

BY ADV. SMT.ELIZABETH MATHAI IDICULLA
SRI.MOHAN IDICULLA ABRAHAM
SRI.RACHEL P.MATHEW
SRI.MARTIN D.ALUMKARA

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 14/11/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

M.SASIDHARAN NAMBIAR, J.

R.S.A.No.740 OF 2004

Dated this the 14th day of November, 2007

JUDGMENT

Plaintiff in O.S.No.276/1990 on the file of Munisiff Court, Cherthala is the appellant. Defendants are the respondents. Appellant instituted the suit for fixation of boundary, permanent prohibitory injunction and for a direction to third respondent to make alteration to the survey plan. Case of the appellant was that item No.1 of the plaint schedule property is in his possession having been obtained under Ext.A1 partition deed dated 18/07/1991 and item No.2 of the plaint schedule property belongs to the respondents and it lies to the south of item No.1 of plaint schedule property and the western portion of items 1 and 2 was acquired by railway for constructing Ernakulam-Thiruvananthapuram railway line and there is a road going through the eastern side of the railway line and the western side of the plaint schedule property and items 1 and 2 of the plaint schedule property are situated in the same plain and soil was taken from the northern side of item No.1 of the plaint schedule property making it in the same level of the western road and a

house was constructed therein. First respondent obstructed removal of soil and appellant filed O.S.NO.21/87 seeking a decree for injunction restraining respondents from tress passing into the property. But that suit was withdrawn reserving the right to institute a fresh suit. On 10/05/1988 appellant issued a notice to third respondent requiring to make necessary changes in the re-survey plan. But no reply was received. The suit was instituted seeking a decree for fixation of the boundary of item No.1 of the plaint schedule property and for a permanent prohibitory injunction and for a direction to the third respondent to alter the re-survey plan as per the refixed boundary. Respondents 1 and 2 in their written statement contended that the boundary description of the plaint schedule properties is not correct and the property in the possession of the first respondent is in Survey No. 269/13, B, C and D and its resurvey No. is 6/11/3 and it is having an extent of 4.45 acres. It was contended that appellant and his ancestors were having right only over the property which lies to the north of the 4.45 acres and there were stone pillars and barbed fence separating items 1 and 2 of the plaint schedule property and barbed fence was fixed by the mother of the appellant and it got destroyed and appellant

removed the broken stone pillars and is claiming right over the property of respondents and he is not entitled to get the boundaries refixed. It was also contended that the property of respondents is having an extent of 18 cents and virivu and the railway authorities have prepared a plan of 12.85 cents acquired by them and there is no mistake in the resurvey plan and the appellant is not entitled to get a direction to the third respondent as sought for and the suit is to be dismissed.

2. Third respondent filed a written statement contending that a final notification of the fixation of the re-survey boundaries was published on 09/05/1985 and resurvey records are being used from 22/09/1988 onwards and resurvey plan is prepared truly and correctly and therefore the suit is barred by limitation.

3. Learned Munisiff framed the necessary issues and on the evidence of PWs 1 to 3, DWs 1 to 3 and Exts.A1 to A4(a) and B1 to B7 dismissed the suit. Appellant challenge the decree and judgment before the Additional District Court, Mavelikkara in A.S.No.58/1996. Learned Additional District Judge on re-appreciation of evidence confirmed the finding of the learned Munisiff and dismissed the appeal. This is challenged in the second appeal.

4. Learned counsel appearing for the appellant was heard. The argument of the learned counsel is that courts below did not appreciate the evidence properly and the prayer in the suit is for fixation of boundary in accordance with the title deed and appellant is entitled to get the boundary fixed in accordance with the boundaries shown in Exts.A1 and B2 title deed of appellant and respondents and the suit is not barred under Section 14 of the Survey and Boundaries Act. Learned counsel also argued that in view of Survey Orindance No. 39/06, section 13A is introduced into Survey and Boundaries Act and sections 13 and 14 were also amended and therefore under Section 13 A appellant is entitled to apply before the District collector to get the mistakes in the resurvey plan corrected or modified and in such circumstances even if the appeal is to be dismissed, right of the appellant to seek remedy as provided under Section 13A may be reserved. Learned counsel also argued that even though no plea regarding adverse possession was raised and no issue was framed, trial court entered a finding that the respondents have perfected title by adverse possession in respect of the portion of the property and first appellate court had confirmed the judgment as such and in such circumstances the said finding is

unsustainable. Learned counsel also argued that Ext.B1 prior title deed does not show virivu and in such circumstances respondents cannot claim title to the disputed portion of the property.

On hearing the learned counsel I do not find any substantial question of law involved in the appeal. It is not disputed at the time of evidence that the survey authorities have completed the fixation of the resurvey boundaries and final notification was published on 09/05/1985. As provided under Section 14, a suit is maintainable, only if it is filed within six months from the date of publication of the notification. Appellant is not entitled to get a direction to the third respondent to refix the boundary after the expiry of six months from the date of publication of the notification in view of the mandate under Section 14 of the Survey Boundaries Act. But there is force in the submission of the learned counsel that trial court should not have entered a finding with regard to the adverse possession, when no issue regarding adverse possession was framed and question of title was also not decided in the suit. Though first appellate court did not consider this aspect, as that question did not arise for consideration, the said finding will not prevent appellant from agitating his title in

appropriate proceedings. The dismissal of the appeal also will not prevent appellant from approaching the District collector as provided in Section 13 A of the Ordinance, if he has such right.

Appeal is dismissed.

M.SASIDHARAN NAMBIAR
JUDGE

sv.